CURTESY, A PROLONGATION OF THE WIFE'S INHERITANCE.

ALTHOUGH it is generally admitted that curtesy and dower are prolongations of the consort's inheritance, and that, if the conditions are such as to prevent this continuity, curtesy or dower must be denied, yet the results of this doctrine have not seemed to be as clearly apparent.

Indeed, so little have they been noticed that some questions, solvable with comparative ease by the application of this principle, have proved difficult of solution without it, and have caused much division and confusion among the authorities.

It is the purpose of this article briefly to consider some of these questions, and to offer solutions based upon the following familiar

PRINCIPLE.

"Curtesy (or dower) is a prolongation of the dying consort's inheritance annexed by the law." [1]

Hence, in order that curtesy be allowed, there must be a strict continuity between the wife's inheritance and the curtesy. Upon the wife's death, there must be no single instant during which her inheritance shall vest in another, free from the claim of curtesy, which must attach *eo instanti* to the deceased wife's estate, if it is to attach at all.

COROLLARIES OF THE PRINCIPLE.

The logical corollaries of this principle are threefold:

1. If, at the wife's death, any conditions for curtesy remain unfulfilled, there is a break in the continuity of the estates that is fatal to the husband's estate, even though all the conditions be subsequently fulfilled;

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[1] See Paine's Case, 8 Co. 36a, where the court concludes its opinion with the statement that the husband's curtesy "is not derived merely out of the estate of the wife, but is created by the law, by privilege and benefit of law *tacitè annexed* to the gift."

2. If, before the wife's death, there is a *termination* (not a mere *transfer*) of her estate, there is again an interval or a gap between her inheritance and the vesting of the curtesy which suffices to destroy the husband's claim;

3. Since the curtesy is a continuation of the wife's estate annexed by *the law* in those cases where there has been no break in the continuity between the two estates, the termination of the wife's estate simultaneous with, or subsequent to, the wife's death, ought not to affect injuriously the husband's curtesy, which is vested in him by the law itself at a time when no other person possessed a better right.

Applications of the Principle.

In the application of this principle, with its logical corollaries, we shall consider the following points: (1) The requirement that issue be born alive during the coverture; (2) The effect of the subsequent legitimation of issue; and (3) The effect of the regular termination of the consort's inheritance.

I. Issue Born Alive during the Coverture.

All the authorities agree that at common law, in order to curtesy, issue must be born alive *during the coverture,* and hence where

> "One, Reppes, of Norfolk, took to wife an inheritrix, who was great with child by him and died in her travail, and the issue was ripped out of her belly alive, and there was a reference out of chancery to the judges, they resolved that he should not be tenant by the curtesy, for it ought to begin by birth of issue and be consummate by the death of the wife, and the estate of tenant by the curtesy ought to take away the *immediate* descent." [2]

Statements to the same effect are to be found in Coke upon Littleton [3] and in Blackstone's Commentaries.[4]

The reason given by Lord Coke is that

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[2] See Paine's Case, 8 Co. 35a, 35b.

[3] Co. Lit. 29b.

[4] 2 Bl. Com. 127.

"The child was not born during the marriage nor in the life of the wife, but in the meantime her land descended, and in pleading he (the husband) must allege that he had issue during the marriage,"

—an explanation which while it is by no means lucid, perhaps affords a hint of the real reason for this apparent straining at a gnat.

Blackstone contents himself with stating the fact, assigning no reason at all.

Mr. Washburne, dealing with the point, without further explanation, says:[5]

"But in most of the States where curtesy is allowed, great strictness is required in the proof that the child was actually born alive in the lifetime of the mother . . . . and if the mother die before the *exitus* of the child, and that be by the Cæsarean operation, though it be born alive, it would not be sufficient to give the father curtesy."

Mr. Tiffany merely mentions the fact that issue must be born at some time during the coverture, without attempting any explanation of the doctrine.[6]

Mr. Reeves, in his recent and able presentation of the Law of Real Property perhaps hints at the true reason, when he says by way of explanation that issue must be born alive;[7]

"And although the primitive notion of curtesy was *a continuance of the wife's inheritance* given to the husband for the benefit of the issue of the marriage, yet it was soon settled that the length of the child's life is immaterial, provided it is born alive; and its death before that of the mother does not take away the right to curtesy."

This explanation, however, is not directed to the doctrine that the issue must be born *during the coverture,* but to the quite distinct principle that the issue must be born *alive.* Indeed, when Mr. Reeves comes to discuss the principle of the birth of issue

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[5] 1 Washburne, Real Prop., Ch. VI, § 46.

[6] 1 Tiffany, Real Prop., § 206. Nor does any explanation appear in 2 Minor's Insts. 133, or in 1 Minor, Real Prop., § 242, where the same doctrine is reiterated.

[7] Reeves, Real Prop., § 455.

during the coverture, his explanation is not the same, or else he is wanting in his customary clearness and lucidity. He says:

> "The requirement that the child be born during the life of the mother arises from the fact that the husband must be able to take possession of the property as tenant by the curtesy consummate instantly on the death of the wife. Otherwise it may descend absolutely to her heirs, and they ought not to be deprived of any part of it because of a subsequent birth of issue. Therefore when the wife dies in labor, and thereafter the child is taken from her by the Cæsarean operation, though it may live, the husband is not entitled to curtesy 'because the child was not born during the marriage, nor in the life of the wife, but in the meantime her land descended, and in pleading he must allege that he had issue during the marriage.' "

The true explanation of this doctrine is to be found in the principle laid down that curtesy is a prolongation or continuation of the dying wife's inheritance annexed by law; and in the first corollary derived therefrom,—that if, at the wife's death, any conditions for curtesy remain unsatisfied, there is a break in the continuity of the estate that is fatal to the curtesy, though all such conditions be subsequently fulfilled.

Hence, in the case of the Cæsarean operation, the interval that would elapse between the wife's death and the *exitus* of the child, though it be a few moments only, constitutes a break in the necessary continuity of the estates sufficient to destroy the curtesy.

On the other hand, the denial of curtesy in those cases where the only issue is issue *born before the coverture* is based on altogether different reasons. The common law simply did not recognize such children. They were bastards,—*filii nullius,*—and their birth prior to wedlock would at common law give the husband no more right to curtesy than if no issue were born at all.

The requirement of the common law that issue must be born *during the coverture* is thus seen to be, not a separate and independent rule of policy, but merely the logical and necessary consequence of the principles just explained. If, in order to curtesy at common law, there must be issue born alive, and that issue cannot be born either before the coverture begins or after it ends,

the only possible rule of the common law must be that the issue be born *during the continuance* of the coverture.

That this is *no independent rule* of the common law, but is merely the strictly logical conclusion drawn from premises founded in other common law principles, is of great importance in the consideration of the question, next to be discussed,—how far the statutes legitimating bastards by intermarriage of the parents affect the common law doctrine that for curtesy issue must be born alive during the coverture. To this inquiry, we shall now address ourselves.

II. Issue Subsequently Legitimated.

Under the statutes, now so prevalent, subsequent legitimation may be accomplished sometimes without any intermarriage of the parents. With these we have nothing to do, since marriage is always a condition precedent to curtesy.

In general, however, the statutes require an intermarriage of the parents, and often demand further that the father either before or after the marriage acknowledge the child. In cases where the legitimation is thus caused or accompanied by the intermarriage of the parents, it is important to determine the effect upon curtesy of such subsequent legitimation of issue born prior to the coverture (supposing no issue born during the marriage).

The writer's investigations have revealed only two cases wherein the point has been decided, and in those opposite conclusions have been reached.

In Hunter *v.* Whitworth,[8] an Alabama case, the court held that the subsequent legitimation of the issue by the intermarriage of the parents was equivalent to a birth of issue during the coverture, and should entitle the husband to curtesy.

In Bond *v.* Bond,[9] a case decided in Virginia on circuit, it was held that such legitimation was not the equivalent of the common law requirement that the issue should be born during the coverture. Curtesy was therefore denied on the ground that such birth of issue during coverture is an independent condition

[8] 9 Ala. 695.

[9] 16 Va. Law Reg., 411, 801. See 24 Harvard Law Rev. 146.

of curtesy imposed by the common law, which, until specifically removed by statute, must govern the case.

But, as has been already pointed out, it would seem that this is not an *independent* principle of the common law, but merely the logical resultant of the two principles, first, that issue born *before* the coverture is not regarded as issue at all at common law, and second, that issue born *after* the coverture is insufficient to support curtesy.

The legitimation statutes reverse the first principle, and with it falls the conclusion of law that issue must be born in all cases during the coverture. Under these circumstances it is difficult to assign a satisfactory reason for the denial of curtesy.

Assuming then, that the Alabama view is correct and that curtesy should be allowed in such cases as a general proposition, it is yet true, under the principles before enunciated, that there may be cases wherein this conclusion must be materially qualified.

If, under the particular statute, the mere intermarriage of the parents, of itself, suffices to legitimate the issue previously born, upon the occurrence of such marriage the previous birth of issue will always become the equivalent of the birth of issue alive during the coverture, and curtesy should be allowed.

But if the statute under investigation demands not only an intermarriage of the parents but also the father's acknowledgment, the allowance of curtesy would then seem to depend upon whether the father acknowledges the child before or after the mother's death.

Should the acknowledgment occur before the mother's death, under the Alabama doctrine there would seem to be no difficulty in permitting the father to take curtesy.

But should the acknowledgment occur after the wife's death, and no issue be born of the marriage meanwhile, it would appear that the case would be analogous to that of the Cæsarean operation at common law. A necessary part of the legitimation has occurred after the wife's death; there is a break in the continuity,—an interval or gap,—between the wife's inheritance and the vesting of the curtesy, which, under the first corollary already noted, should suffice to destroy the husband's estate.

III. Effect of Regular Termination of Consort's Inheritance.

It is a well settled rule of the common law,—indeed it is merely a restatement of the principle constituting the text of this thesis, that if, at the consort's death, the inheritance expires by its regular limitation, the consort's seisin meanwhile remaining unimpaired, curtesy and dower are prolongations of the estate annexed by law.[10]

The instances of termination of the wife's estate now to be examined are (1) The wife's estate in a fee tail terminated by her death without surviving issue; (2) The wife's fee simple terminated by her death without heirs; (3) The wife's fee qualified terminated by the occurrence of the event on which it is limited; (4) The wife's conditional limitation terminated by the event upon which it is to go over to another.

1. *Wife's Fee Tail Terminated by Her Death without Living Issue.*

In this case all the authorities unite in declaring that the curtesy attaches as a prolongation or continuation of the wife's estate annexed by law, at the expense of the reversioner or remainderman, though the latter's estate is vested in right at the moment of the wife's death.[11]

2. *Wife's Fee Simple Terminated by Her Death without Heirs.*

Here again, unless the husband is himself made the wife's heir and is thus remitted to the higher estate in fee simple by descent, there seems to be unanimous assent to the proposition that, the wife's estate having run out the regular period marked

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[10] While this article deals only with curtesy, the same principles apply to dower, save only that issue is necessary to curtesy, while it is unnecessary in the case of dower. The principles with regard to issue have already been considered. From this point on, therefore, the discussion applies as well to dower as to curtesy.

[11] See 1 Washburne, Real Prop., Ch. IV, § 17, etc.; 2 Minor's Insts. 131; 1 Roper, Husb. & W. 37-39; 1 Bright, Husb. & W. 133; Minor and Wurts, Real Prop., § 230; 1 Reeves, Real Prop., § 451; Paine's Case, 8 Co. 36a.

for it in its original limitation, the husband's curtesy is annexed thereto as a prolongation of the wife's inheritance, at the expense of the State, which would otherwise be entitled to it by escheat.[12]

3. *Wife's Fee Qualified Terminated by Its Regular Limitation.*

The commentators upon the Law of Real Property, no less than the judges in their decisions, have experienced great difficulty in laying down with precision the principle which should control curtesy in fees qualified, as well as in conditional limitations.

Thus Mr. Washburne, after a lengthy discussion of the questions involved, concludes as follows:[13]

> "If, therefore, the estate of the wife be an estate of inheritance determinable by a limitation which operates to defeat her estate at common law (fee qualified), the right of curtesy, it would seem, is gone. But if the limitation over be by way of springing use or executory devise, which takes effect at her decease, thereby defeating or determining her original estate before its natural expiration, and substituting a new one in its place, which could not be done at common law, the seisin which she had of the fee simple or tail will give the husband curtesy." [14]

The view taken by Mr. Minor in his Institutes[15] is that if the wife's estate runs out the period marked for it, without impairing her previous seisin, there is no more reason why curtesy should be denied in the case of a base or qualified fee than in case of a fee simple or a fee tail where the wife dies without heirs.

Mr. Reeves presents still a third view, as appears from the following extract:[16]

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[12] 1 Washburne, Real Prop., p. *212; 2 Minor's Insts. 130; 1 Bright, Husb. & W. 348; 1 Minor, Real Prop., § 247.

[13] 1 Washburne, Real Prop. Ch. VI, 21. See also, Park, Dower, 162, 163.

[14] Citing 1 Roper, Husb. & W. 36-42; 4 Kent's Com. 33, and note; 3 Prest. Abst. 372, 384; Co. Lit. 241a, Butler's Note, 170; Article in 11 Am. Jur. 55.

[15] 2 Minor's Insts. 130.

[16] 1 Reeves, Real Prop., § 454.

"The nature and duration of curtesy in an estate in fee on limitation (called 'collateral limitation') presents a question not settled by the decisions. The weight of the opinions of the best judges and text-writers, in this country at least, is that curtesy may attach to such an interest, but subject to be terminated by the event which ends the fee on limitation,—that, if land be conveyed to a married woman and her heirs so long as no intoxicating liquor is sold thereon, her husband has curtesy, which will be defeated *ipso facto* by the sale of such liquor on the land.[17] But the strong view of some good authorities is that curtesy may be had absolutely in such an estate, so as not to be defeated by the running out of the limitation,—that, in the last illustration, curtesy once attached would continue during the husband's life, even though intoxicating liquor was sold on the premises." [18]

Without quoting further from the authorities it will be seen that there is great difference of opinion as to the existence and extent of the husband's curtesy in the base or qualified fees of the wife.

It is submitted, with diffidence, that a proper analysis of the various situations that may be presented, and the application of our second and third corollaries above deduced from the principles that curtesy and dower are prolongations of the consort's inheritance annexed by law, will go far towards the solution of many of the problems involved.

Assuming that the wife's estate has been limited in the following form of a fee qualified,

"To W and her heirs as long as B has heirs of his body," [19]

we shall discuss the following conditions under which W's estate may terminate: (1) When the heirs of B's body do not fail at all, or do not fail during the life of either consort; (2) When they fail during the coverture; and (3) When they fail while the curtesy is vested in the husband.

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[17] Citing Co. Lit. 241a, Butler's Note, 170; 1 Atk. Conv. 255; 3 Prest. Abst. 384; 1 Scribner, Dower, 297.

[18] Citing Buckworth *v.* Hinkell, 3 Bos. & P. 652; Odom *v.* Beverly, 32 S. C. 107; Park, Dower, 172, 186; Chase's Blackst. 307, note 4.

[19] See Machall *v.* Clarke, 2 Raym. 778, 2 Salk. 619, 7 Mod. 18.

A. Wife's Fee Qualified Terminated by Happening of Event after Death of Both Spouses, or Not Terminated at All.

If, in the case supposed, the heirs of B's body do not fail, or do not fail till after the death of both spouses, there can be no reason why the husband should not enjoy curtesy, supposing issue of the marriage born alive during the coverture.

At the time of the wife's death she is seised in fact of such an inheritance that the issue may by possibility, inherit it as heirs of the wife, there is issue born alive during the coverture, and the wife dies. Thus, absolutely all of the conditions for curtesy exist, and no reason can properly be urged why the husband should not be entitled to curtesy.

Nor, so far as the writer's investigations have led, are there any authorities that have denied curtesy in such a case, aside from the mere *dicta* of text-writers, such as that contained in the quotation from Mr. Washburne above given.[20]

B. Wife's Fee Qualified Terminated by Happening of the Event during the Coverture.

If, in our illustration, the heirs of B's body should fail during the coverture, quite a different condition is presented.

W's inheritance is terminated, let us say, five years before her death by B's death without surviving issue. It is clear that we have here an interval or a gap of five years between the end of the wife's estate and the consummation of the curtesy through her death; and since the curtesy can exist only as a prolongation or continuation of the wife's estate, it is equally clear that this five year break in the continuity, under our second corollary, suffices to destroy the curtesy.

Perhaps it is a case such as this that those text-writers have in mind who lay down the broad proposition that neither curtesy nor dower can be had in fees qualified;[21] and, on the other hand, those authorities which have declared without limitation that curtesy and dower may be had in fees qualified would seem to have overlooked this case.

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[20] See Graves, Notes on Real Prop. pp. 502, 503.

[21] See Graves, Notes on Real Prop. pp. 502, 503.

C. *Wife's Fee Qualified Terminated While Curtesy Is Vested in the Husband.*

If, in our illustration, the heirs of B's body fail after the wife's death, but while the husband is still possessed of his curtesy, a more difficult question is presented.

Since, at W's death, no one can know whether the heirs of B's body will fail during the husband's life, curtesy must at that time be allowed him; and if B's heirs do not fail at any time during the husband's life, he must, as we have seen, secure the full enjoyment of his life estate.

But if, after he has acquired curtesy, the heirs of B's body fail in his lifetime, whereby the wife's estate is *ipso facto* ended, can the husband's curtesy (which is derived from and, as it were, carved out of, her inheritance) be prolonged during his life, or must his life estate fall with the wife's inheritance, from which it has been derived?

Here again the authorities are in conflict, witness the extract already given from the work of Mr. Reeves, himself one of the latest and best American commentators on the Law of Real Property. Part of that extract is worthy of repetition here. He says: [22]

> "The weight of the opinions of the best judges and text-writers, in this country at least, is that curtesy may attach to such an interest (fee qualified), but subject to be terminated by the event which ends the fee on limitation . . . . But the strong view of some good authorities is that curtesy may be had absolutely in such an estate, so as not to be defeated by the running out of the limitation."

Appealing from this difference of opinion among the authorities to the pure reason of the common law, there would seem to be no argument that may be urged against the continuance of the husband's curtesy in such case that would not apply with equal force to his curtesy in the estate tail of his wife, terminated by her death without surviving issue.

If it be argued that to allow the husband to retain his curtesy would defeat the contingent right of the ultimate takers after

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[22] 1 Reeves, Real Prop., § 454.

the fee qualified is terminated, it may be replied that to allow the husband curtesy in the wife's fee tail in the case mentioned equally interferes with the vested rights of the reversioner or remainderman after the termination of the fee tail.

If it be argued that, since curtesy is derived from or carved out of the wife's estate, it must fail upon any event that destroys her estate,[23] it may here too be replied that the husband should not then be given curtesy in the wife's fee simple or fee tail terminated by her death without heirs.

If, in these cases, the curtesy is a prolongation annexed by law to the wife's estate at the expense of the State (by escheat in the case of the wife's fee simple ended by her death without heirs) or at the expense of the reversioner or remainderman (in case of the wife's fee tail ended by her death without surviving issue), what is there so sacred about the mere quasi-reversion or possibility of reverter in the grantor of a fee qualified as to demand that the husband's curtesy at his expense should be denied?

Indeed it would seem that the case under discussion is even stronger than that of an estate tail terminated by failure of issue since, in the case of the fee qualified, the curtesy, under our supposition, has already been vested and enjoyed for a time, and the question is whether it shall be *defeated;* whereas in the case of the fee tail the only question is, shall it be permitted to *arise.*

Diligent investigation has failed to reveal any satisfactory reason why there should be conferred upon the contingent right of the quasi-reversioner after a fee qualified this superiority over the vested right of the reversioner or remainderman after a fee tail or over the right of the State to an escheat after the failure of a fee simple by the exhaustion of heirs.

In concluding this study of curtesy (or dower) in fees qualified, it may be worth while, even at the risk of prolixity, to note more particularly the discussion of Mr. Park in opposition to curtesy and dower in such estates, since he is at once perhaps the most strenuous and the most authoritative opponent of the doctrine.

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[23] See 1 Washburne, Real Prop. Ch. VI, § 17.

Without noticing the *dicta* of text-writers quoted by him, and confining our attention to the actual decisions he refers to, we find him saying: [24]

> "It is understood that titles of dower are defeated by the determination of estates of inheritance by the operation of *collateral limitations* (fees qualified). It is clear law that where a man makes a gift in tail reserving rent to him and his heirs, and the donee dies without issue, the wife of the donor shall not be endowed of the rent; [25] and if she has been previously endowed thereof, her dower shall *cease* by the determination of the tenancy.[26] The reason of this, according to Jenkins, is because 'this is a collateral limitation.' "

It is apparent that the estate which the donor would have in the rent is a fee qualified limited to him and his heirs as long as the donee has heirs of the body, and is therefore identical with our own illustration of a fee qualified, save for this important difference, namely, since the property wherein the estate exists is *rent* payable by the donee and the heirs of his body, the rent, upon the donee's death without issue, ceases to exist; the very *corpus* of the property is destroyed. Not only is the donor's *estate* in the rent terminated, but (a point overlooked by Mr. Park) the *very thing* in which the estate is enjoyed is likewise annihilated.

Since then nothing is left wherein any estate may be had, it is obvious that curtesy and dower must perish together with the *corpus*. And this must be equally true whether this annihilation of the rent occurs in the donor's lifetime, or after the vesting of the curtesy or dower.

But, upon the termination of a fee qualified in *land* (which leaves the *corpus*,—the land,—intact, and merely terminates the *estate* therein), it does not follow, as Mr. Park infers, that curtesy or dower in the *land* would necessarily be thereby destroyed.

Again, Mr. Park says: [27]

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[24] Park, Dower, 162, 163. See, also, 1 Scribner, Dower, 297.

[25] Citing Fitzh. N. B. 149 (G) & *ca. ci;* and as to curtesy, Co. Lit. 30a.

[26] Citing Arg. Moor, 39, pl. 126.

[27] Park, Dower, 163.

"In like manner it has been held, and is undisputed in law, that if A grants a rent out of certain land to B and his heirs, provided that if B die, his heirs being within age, that during the non-age the terre-tenant shall be quit of the rent; and B marries and dies, his heir within age, and the wife of B recovers dower of the rent, execution shall be stayed till the heir comes to full age.[28] This case shows that if the rent had been made to cease *absolutely* upon the event, the dower would have been at an end."

Here again, it is submitted, Mr. Park, has failed to note that it is the *corpus* of the property (the rent), not merely the *estate* therein that fails or is suspended. There can be no curtesy, dower or any other estate, when there is no property wherein the estate may be had.

Again, Mr. Park says:[29]

"And it may be propounded that the operation of a collateral limitation, whether express or implied, will defeat the title of dower as well when it converts the estate of the husband into an estate of freehold as when it determines it altogether. An example of this may occur where the husband is tenant of a determinable fee derived out of an estate tail special, and *during the coverture* the determinable fee becomes an estate *pur auter vie* by the tenant in tail becoming tenant in tail after possibility of issue extinct."

The conclusion here reached, while doubtless sound, is only evidence of the proposition already formulated as our second corollary,—that, curtesy and dower being prolongations of the consort's *inheritance,* there must be no break in the continuity between that inheritance and the consummation of the curtesy or dower.

But it does not follow from Mr. Park's conclusion that the wife's dower would be destroyed, had the tenant in tail become a tenant in tail after possibility of issue extinct,—not *during the coverture* as Mr. Park has it,—but after the husband's death and after the wife has come to her enjoyment of dower in the determinable fee. It is believed that in such case the contrary would be true.

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[28] Citing Fitzh. N. B. 149, note (a), & *ca. ci.*

[29] Park, Dower, 165. See, also, 1 Scribner, Dower, 297.

4. *Wife's Conditional Limitation Terminated by the Event upon Which It Is to Go Over to Another.*

The last case in which our principle and its corollaries will be applied arises in the case of a determinable fee in the wife, which is to pass over to another upon the occurrence of a given event, by way of *conditional limitation,* under the statutes of Uses, Wills, etc.

As in the case of a fee qualified, so here the authorities are more or less confused as to the right to curtesy or dower in the consort's inheritance where it is an estate of this sort. But it is respectfully submitted that once again the confusion is due rather to the failure to analyze properly the various situations and to carry to their logical conclusions the principles discussed in this article than to any great inherent difficulty in the subject.

As proof of this lack of proper analysis and the resulting confusion, an extract is here given from Mr. Washburne's work: [30]

> "The first of these estates (the wife's) may be a fee, and the event that determines it and passes it over to the third party may be *the dying* of the first taker without issue, of before a certain age, or both; and the question then has been whether the husband or wife of such first taker is thereby defeated of what, till that event, had been a right incident to an existing estate, or might enjoy it, although as to the deceased the estate was determined by death. Lord Mansfield, in one case, was of opinion that the husband in such case was entitled to curtesy; [31] and Best, C. J., was of a like opinion in a case of dower.[32] But the doctrine does not find favor with Mr. Park in his work on Dower; [33] and the opinion of Lord Mansfield is impugned by Mr. Sugden.[34] . . . . And the English court held, in a case where a conveyance was made to such uses as C D should appoint, and in default, and until, appointment, to the use of C D in fee, who was married, that by the execution of this appointment *in the lifetime of C D,* his estate was de-

[30] 1 Washburne, Real Prop. Ch. VI, §§ 19, etc.
[31] Buckworth *v.* Hinkell, 3 Bos. & P. 652n.
[32] Moody *v.* King, 2 Bing. 447.
[33] Park, Dower, 177-183.
[34] 2 Sugden, Powers, 31.

> feated, and with it his wife's right of dower.[35] Mr. Burton alludes to the circumstance that in one class of the English cases above cited the estate was defeated by the *death* of the first taker, and in the other by the act of the first taker *in his lifetime.* But apparently concluding that this can hardly reconcile these decisions, he adds: 'Such and so subtle appears the distinction on the ground of positive law between these decisions.' [36] Gibson, C. J., undertakes to explain away these difficulties, in the case of Evans *v.* Evans.[37] . . . . declaring that none of the text-writers, except Mr. Preston, had suggested the true solution of the difficulty in such cases in giving curtesy or dower to the husband or wife of the deceased person whose entire estate was determined by the death; and held the solution to be that estates determinable by executory devise and springing (shifting?) use are *not governed by common law principles.* It was accordingly held that a limitation to A and her heirs, with a limitation over to N upon A's dying without issue, was such an estate in A as gave her husband the right of curtesy therein."

This quotation has been given at length not only to show the difficulties the commentators have experienced in the discussion of this topic, and how they have felt around for some solid ground of reason upon which to rest their conclusions, but especially to show here the need of analysis and the application of the principles we are considering.

Thus, in the matter of analysis, most of the authorities have completely failed to distinguish clearly between that class of conditional limitation which depends upon an *event unconnected with the first taker's death* and that which depends upon an *event necessarily involving the death of the first taker.* Here is the important difference. The first sort of event may precede or follow, but will not accompany, the first taker's death. The second cannot precede or follow, but, if it happen at all, must accompany his death.[38]

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[35] Ray *v.* Pung, 5 B. & A. 561.

[36] Burton, Real Prop. 145.

[37] 6 Penn. St. 190.

[38] This distinction seems to have been noted by several of the text-writers. See 1 Scribner, Dower, 319, 320; 1 Bishop, Mar. Wom., § 313, and has been clearly made by Mr. Graves, in his Notes on Real Prop. p. 501, note.

Mr. Burton alludes to the distinction, but seems to discard it, or at least to deem it of little importance, dismissing it with the statement: "Such and so subtle appears the distinction, on the ground of positive law, between these decisions;" [39] and Mr. Washburne himself,[40] as also Mr. Reeves,[41] deals only with the second class of conditional limitation above alluded to.

Yet it may be reasonably affirmed that this distinction is the basis of the analysis of the subject and the foundation of a course of reasoning which, it is submitted, will solve most of the problems that arise in this connection.

On the other hand, the explanation of Gibson, C. J., in Evans *v.* Evans,[42] (also embraced in the extract above given from Mr. Washburne's work) that curtesy and dower are allowed in such conditional limitations because they are not governed by common law principles, is really no explanation at all. For while, as the learned Chief Justice affirms, conditional limitations are not common law estates and are not necessarily controlled by common law principles, the reverse is true of curtesy and dower which, in the absence of special statute, can only arise under the conditions permitted by the common law.

A statute, in creating an estate, may attach to it qualities that may come into conflict with the common law requirements for curtesy and dower, and thus the statute, the purpose of which is to create an estate, may incidentally destroy the curtesy or dower of the owner's consort; or the statute creating the estate may give it the qualities which the common law demands as essential in order that there should be curtesy or dower therein. But unless it is expressly or by necessary implication so provided, curtesy or dower cannot be had in a conditional limitation or other estate, merely because it is a creature of statute, if it do not possess the qualities essential *at common law* to the existence of curtesy or dower.

It is not apparent, therefore, how Chief Justice Gibson's state-

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[39] Burton, Real Prop. 145.

[40] 1 Washburne, Real Prop. Ch. VI, §§ 19, etc.

[41] 1 Reeves, Real. Prop., § 454.

[42] 9 Penn. St. 190. The same explanation is offered by Mr. Reeves. See 1 Reeves, Real Prop., § 454.

ment that conditional limitations are not governed by common law principles serves as an explanation of the fact that curtesy and dower are to be allowed in conditional limitations if, as he assumes (erroneously, in the writer's judgment), they are not allowed in fees upon collateral limitation at common law (fees qualified).

But as a matter of fact it is submitted that it is unnecessary to invoke other than common law principles to arrive at the conclusion reached in Evans *v.* Evans, by Chief Justice Gibson, or in other cases that have been decided upon this point.

As preliminary to the discussion to follow, the reader is reminded of the common law principles controlling estates upon condition subsequent.

He will remember that if, at common law, an estate of *freehold* (requiring livery of seisin to create it) be limited to a person upon condition subsequent, the mere breach of the condition does not of itself terminate the estate so limited, but the common law demands that it shall be terminated by the notorious act of re-entry on the part of the grantor or his heirs, corresponding to the notorious act of livery whereby it is created;[43] and further, that when this re-entry takes place it impairs or defeats the previous seisin of the grantee from the beginning, the grantor (or his heirs) being seised by title paramount, and, in destroying the first taker's estate (including the curtesy or dower of the consort), it also destroys that of the second taker.[44]

But these familiar principles of the common law cease to apply if the limitation is created by an instrument operating under the statute of Uses or the statute of Wills, because these statutes, having abrogated the need of livery of seisin to create a freehold, have also dispensed with the corresponding notoriety of the grantor's re-entry to terminate the first taker's estate, permitting the estate, upon the happening of the given event, to shift over to the second taker at once, without impairing or defeating the *previous* seisin of the first taker;[45] thus giving rise

[43] Minor and Wurts, Real Prop., § 473.

[44] Minor and Wurts, Real Prop., §§ 474, 481.

[45] Minor and Wurts, Real Prop., §§ 481, 482; 1 Reeves, Real Prop., § 454. 4 Kent's Com. *33.

to "conditional limitations," not valid under the rules of the common law, but good under the statutes of Uses and Wills.

As examples of conditional limitations, we shall use the two following devises:

"To W in fee simple, but *if W. die* without issue living at her death, to B in fee simple;"

and

"To W in fee simple, but *if C die* without issue living at his death, to B in fee simple."

It will be observed that the first of these conditional limitations is dependent upon a condition which *necessarily involves the death of W* (the wife), while, in the second example, the event upon which the estate is to go over to B may precede, or may follow, but cannot well accompany, the death of W.

This distinction, unimportant and "subtle" as it appears to Mr. Burton,[46] will constitute the basis of our analysis of the subject.

A. Wife's Estate to Go Over to Another Upon an Event Involving the Wife's Death.

Although not without past waverings and misgivings,[47] the authorities seem to have finally reached the conclusion that curtesy (and, in a corresponding case, dower) should be allowed in such estates. Indeed the cases in which it has been so held are now very numerous.[48]

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[46] Burton, Real Prop. 145.

[47] See Webster *v.* Ellsworth, 147 Mass. 602; Edwards *v.* Bibb, 54 Ala. 475; 2 Sugden, Powers, 31; Park, Dower, 177-183; 1 Scribner, Dower, 297-320. Some of the authorities have tried to make a distinction between the case of a *shifting use* and that of a *shifting devise*. See 1 Atk. Conv. 258.

[48] Buckworth *v.* Thirkell, 3 Bos. & P. 652, note; Moody *v.* King, 2 Bing. 447; Hatfield *v.* Sneden, 54 N. Y. 280; Evans *v.* Evans, 9 Penn. St. 190; McMasters *v.* Negley, 152 Penn. St. 303; Nickett *v.* Tomlinson, 27 W. Va. 697; Welch *v.* Brimmer, 169 Mass. 214, 215; Webb *v.* Trustees, etc., 90 Ky. 117; Withers *v.* Jenkins, 14 S. C. 597; Kennedy *v.* Kennedy, 29 N. J. L. 185; Northcut *v.* Whipp, 12 B. Mon. (Ky.) 65; Hay *v.* Mayer, 8 Watts (Penn.) 203, 34 Am. Dec. 453; Thornton *v.*

Thus if an estate be limited

"to W in fee simple, but if W die without issue living at her death, to B in fee simple,"

and W dies without issue, then according to the authorities W's husband shall be given curtesy, and B shall be postponed till after the husband's death.

Applying the principles already discussed, it would seem that this conclusion is correct. For (supposing the other requirements) if the condition of curtesy is that the wife's estate should expire without impairing or defeating the *previous seisin* of the wife, in which case curtesy is annexed to the estate as a prolongation thereof, it is evident that this condition has been complied with. The previous seisin of the wife has not been impaired by the breach of the condition, as it would have been at common law (owing to the common law necessity for the grantor's re-entry for breach of the condition), but it terminates of itself by the mere occurrence of the event and (but for the curtesy) passes over to B, leaving W's previous seisin unimpaired.

Furthermore there cannot possibly be any interval or gap between the termination of the wife's estate and the vesting of the husband's curtesy (if he is entitled thereto), since the same event,—W's death without surviving issue,—that terminated her estate consummates his, which therefore is strictly a continuation or prolongation of her inheritance.

This result must also follow in all cases like the one above, where the event which terminates the consort's estate necessarily *accompanies the death of the wife*; for example, where the prop-

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Krepps, 37 Penn. St. 391; Crumley *v.* Deake, 67 Tenn. 361; Taliaferro *v.* Burwell, 4 Call (Va.) 321; Jones *v.* Hughes, 27 Gratt. (Va.) 560; Medley *v.* Medley, 27 Gratt. 568; Daniel *v.* McManama, 1 Bush (Ky.) 544; Fry *v.* Scott (Ky.) 11 S. W. 426; Pollard *v.* Slaughter, 92 N. C. 72, 53 Am. Rep. 402; Milledge *v.* Lamar, 4 Desans. (S. C.) 617; Carter *v.* Couch (Ala.) 47 So. 1006. All of these are cases of a fee in the consort determinable upon the consort's dying without heirs, issue, etc., where the condition has been fulfilled. See, also, Graves, Notes on Real Prop., pp. 498, 499; 1 Scribner, Dower, 297, et seq.; Co. Lit. 241a, Butler's Note, 170; 3 Preston, Abst. 372, 384; 1 Roper, Husband & W. 36-42; 1 Washburne, Real Prop. Ch. VI, §§ 20, 21; Ibid. Ch. VII, §§ 4, 32; 1 Reeves, Real Prop., § 454.

erty is limited "to W in fee, but *if she die under thirty,* to B in fee."

B. Where the Wife's Estate Is to Go Over upon an Event Not Necessarily Involving the Wife's Death.

Most of the text-writers have dealt with the first class of conditional limitation above mentioned (involving the *wife's death*) as if that were the only class,[49] and have become more or less confused whenever they have encountered instances of the second class now to be discussed.[50]

Yet it would seem quite evident that, so far as curtesy or dower is concerned, the same principles should operate as in the first class of conditional limitation above considered, save only that in the second class of such limitations there are possibilities of an interval or a gap between the contingent termination of the wife's estate and her death (consummating the husband's curtesy), which do not exist in the first.

Suppose, for example, a limitation

> "to W in fee simple, but if C die without issue living at his death, to B in fee simple."

Here, as in the case of fees qualified, there are three periods, to either of which may be referred the termination of W's estate. C's death without issue may terminate it (1) Only after the death of both W and her husband, or not at all; (2) Before the death of W; or (3) After the death of W, but while her husband is still in possession of the curtesy.

(1) *Where the Contingent Termination Occurs Only after the Death of Both Husband and Wife; or Does Not Occur at All.*

Let us suppose, in the example just given, that in C's lifetime, W dies leaving issue.

By all the rules that govern curtesy, the husband must be allowed his life estate. For the inheritance of the dying wife is still

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[49] For example, see 1 Reeves, Real Prop., § 454; 1 Washburne, Real Prop. Ch. VI, §§ 19, 20, 21; Ibid. Ch. VII, §§ 4, 32.

[50] For an illustration of this see 1 Washburne, Real Prop. Ch. VI, § 19.

hers so that the issue of the marriage may inherit the property as her heirs; she has issue born alive during the coverture; and she is now dead; the inheritance descends upon the issue; and the previous seisin of the wife has been in no wise impaired. All the conditions of curtesy are fully met, and no possible ground can be alleged upon which the curtesy should be denied.

If we further suppose that C continues alive throughout the husband's lifetime, or dies leaving issue, it is obvious that nothing has occurred prior to the husband's death to terminate the curtesy thus given him, and so he will enjoy it in its entirety just as if the wife had possessed from the beginning an absolute fee simple.

Thus, in Jackson *v.* Berry,[51] land was devised to A in fee, but if his brother, J, should ever become *compos mentis,* then to J in fee. A died in J's lifetime, J remaining insane till his death. It was held that A's widow was entitled to dower.

In Peay *v.* Peay,[52] land was conveyed

> "in trust for the use of A. P., his heirs and assigns forever, and to permit the said A. P. to have and possess the same . . . . . and in trust to convey the same to such persons as A. P. shall by deed or will direct and appoint."

It was held that A. P. took a fee determinable by the execution of the power of appointment and that A. P. having *died without executing the appointment,* his wife was entitled to dower.

(2) *Where the Contingent Termination Occurs before the Wife's Death.*

Taking the same example as before, let us next suppose that C dies without issue in the wife's lifetime, and that she dies five years later, her husband and issue surviving her.

Applying our principle, with its second corollary, since curtesy is a prolongation of the wife's inheritance annexed by law at the time of the wife's death, there could be no curtesy in this

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[51] 8 N. J. L. 241.

[52] 2 Rich. Eq. (S. C.) 409. See, also, Link *v.* Edmondson, 19 Mo. 487.

case, for the wife's inheritance has been *terminated* (not merely *transferred by her*) five years before her death, and hence there is this breach in the continuity, this interval or gap, between the termination of her estate and the consummation of the curtesy upon her death, which is fatal to the husband's claim.

Thus, in Ray *v.* Pung [53] (a case of dower), the conveyance was to such uses as the husband should appoint, and in default of, and until, appointment, to the use of the husband in fee. The husband having executed the appointment *in his lifetime,* it was held that his estate was thereby at once defeated, and with it his wife's dower also.

This decision is manifestly sound since, during the period from the exercise of the power to the consummation of the wife's dower by reason of the husband's death, there was a break in the continuity of the husband's estate, of which therefore the dower could not have been a continuation or prolongation.

Yet Mr. Washburne [54] cites this case apparently as in opposition to the doctrine he seems to maintain without qualification, —that curtesy and dower may be had in estates going over by way of conditional limitation.

So, in Evans *v.* Evans,[55] which was a case involving dower in an estate given to the husband in fee, but to go over to another *in case of his death without issue* (an instance of the first class of conditional limitation above mentioned), Gibson, C. J., laying down the principle that curtesy and dower should be allowed *in all cases* of conditional limitation because they are not governed by common law principles, adds:

> "Flavell *v.* Ventrice, 1 Roll. Abr. 676, was also the case of a springing use, in which however the court was divided. That two of the judges had not embraced the new faith at that day is not surprising; but that Lord Eldon should have

[53] 5 B. & A. 561. See, also, Maundrell *v.* Maundrell, 10 Ves. 263; Thompson *v.* Vance, 1 Met. (Ky.) 670; Chinnubbee *v.* Nicks, 3 Port. (Ala.) 362. Mr. Sugden, while admitting that curtesy and dower are destroyed in such cases, seems unable to supply a satisfactory explanation. 2 Sugden, Powers, 31, 32. See, also, 1 Scribner, Dower, 295, 296.

[54] 1 Washburne, Real Prop. Ch. VI, §§ 19, 21.

[55] 9 Penn. St. 190, 192.

> inclined to think, as he did, in Maundrell *v.* Maundrell, 10 Ves. 263, that a husband might bar his wife's dower by executing a power of appointment, is more remarkable. He was still groping after a fancied distinction between a collateral limitation and a limitation of the estate; which, if it exists, has nothing to do with an estate conveyed to uses."

It will be noted from this extract that Chief Justice Gibson condemns the very doctrine approved in Ray *v.* Pung, *supra,* and in Maundrell *v.* Maundrell, observing no distinction between those cases and the case before him.

Space does not permit further display of the confusion that runs through most of the authorities upon this point,—a confusion that seems to have emanated from a failure closely to analyze the various situations that may arise in these cases, and to bear in mind the maxim which is the subject of this article.

(3) *Where the Contingent Termination Occurs after Consummation of the Curtesy, but in the Husband's Lifetime.*

It is to be observed that neither this nor the preceding case can arise under the first class of conditional limitation, for in such case the contingency, necessarily involving *the wife's death,* must occur, if at all, at the very moment of her death, and cannot take place either before or after that date.

The writer has endeavored in vain to detect any adequate reason why the case now under discussion should be differentiated from that of the wife's ownership of a fee qualified under similar conditions.

It has already been shown in an earlier portion of this article that if the wife owns a fee qualified, which is terminated after the consummation of the husband's curtesy, but in his lifetime, the better view, on principle at least, and with respectable authority to sustain it, is that the termination of the fee qualified will not affect the husband's curtesy already vested in him. So to hold would be to make the rights of the grantor or quasi-reversioner after a fee qualified superior to the rights of the reversioner or vested remainderman after a fee tail terminated by the owner's death without issue, or to the right of the State (by way of escheat) after a fee simple terminated by the owner's

death without heirs, in both of which cases it is settled law that curtesy or dower may be had.

The right of the second taker in a conditional limitation after a fee in the first taker is, like the right of the grantor after a fee qualified, only a possibility of interest, not a vested estate; and, as opposed to the rights of the second taker, who comes in *in the post,* we have the curtesy right of the husband annexed by law, which right begins *in the per* and *not in the post,* and has become vested in possession while the right of the second taker was yet a mere possibility. It would be difficult to find any principle, legal or equitable, which would justify a procedure whereby the husband would be deprived of an estate vested in him by law at the instance of one who certainly has no better title than himself. As between the two equally good legal titles, that first in time should prevail.

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